Simpang Maju Enterprises Sdn Bhd v Soh Yen Ling (representative to Chau Yau Seng, deceased) (Malayan Banking Bhd, third party)

HIGH COURT (MELAKA) — WRIT SUMMONS NO 22NCVC-50–09 OF 2015
VAZEER ALAM J
24 JUNE 2016

Contract — Sale and purchase of property — Sale and purchase agreement ('SPA') — Buyer signed SPA with developer to buy house but died before bank could release his loan for balance purchase price — Bank refused to disburse loan and cancelled loan agreement and discharged its charge on property — Whether bank entitled to do so under terms of letter of offer/loan agreement — Whether bank negligent or committed breach of contract in not releasing loan and in not paying premium for mortgage reducing term assurance cover — Whether onus always on buyer to pay purchase price despite financier's undertaking — Whether developer entitled to terminate SPA, obtain agreed liquidated damages and have property transferred back to its name for non-payment of purchase price

The plaintiff, a housing developer, entered into a sale and purchase agreement ('the SPA') to sell a house ('the property') that was under construction to a buyer ('the deceased') for RM338,000. The deceased paid the plaintiff a deposit of RM50,900 and took a loan from the third party Malayan Bank Bhd ('MBB') to settle the balance purchase price. The loan comprised a premium that was payable for a mortgage reducing term assurance ('MRTA') cover which MBB was to pay when it disbursed the loan. MBB gave a conditional undertaking that it would release the balance purchase price to the plaintiff if all pre-disbursement conditions for the loan were met. The property was registered in the deceased's name and a charge on the property was registered in MBB's name. While two other pre-disbursement conditions were pending fulfillment, the deceased died in a road accident. MBB informed the plaintiff that it would not disburse the loan and it terminated the loan agreement and discharged its charge on the property. The plaintiff, meanwhile, completed the construction of the property and notified the defendant, as administrator of the deceased's estate, to take delivery of vacant possession and pay the balance of the purchase price. The defendant did not comply, compelling the plaintiff to terminate the SPA after giving the defendant 14 days' notice. The plaintiff then filed the instant action to declare that the SPA and the transfer of ownership of the property to the deceased were void and sought an order that the defendant transfer the property back to it. The plaintiff also sought damages at the rate of 10%pa on the balance purchase price from the date the progressive payments

were due. The defendant contended that the deceased's estate was not liable because MBB had given an undertaking that it would release the loan to the plaintiff. The defendant alleged that the termination of the SPA and the cancellation of the loan agreement and the discharge of charge were all void actions and counterclaimed for a declaration that the SPA and the transfer of the property in the deceased's name were valid and subsisting. With leave of court, the defendant added MBB as a third party to the action and claimed indemnity and contribution against it in the event the defendant was held liable to the plaintiff. The defendant also sought declarations that MBB's termination of the loan agreement and the discharge of charge were invalid. The defendant argued that MBB had committed breach of contract and was negligent in refusing to release the loan and paying the premium for the MRTA. MBB denied the charges contending that the loan was not released because all conditions precedent for its disbursement were not fulfilled and that, in any event it was entitled under the letter of offer/loan agreement to withdraw/cancel the loan if the borrower died.

Held, granting judgment to the plaintiff and dismissing the defendant's third party claim:

(1) It was clear from cl 5(4) of the SPA that the obligation to pay the purchase price was always on the buyer. MBB had also made it clear in its letter of undertaking to the plaintiff that the undertaking was conditional and that nothing therein affected the obligations of the purchaser under the SPA. The defendant was therefore in fundamental breach of the SPA for not paying the balance purchase price which entitled the plaintiff to terminate the SPA under cl 10(1)(a)(i). The plaintiff's termination of the SPA was therefore valid and lawful (see paras 25–28 & 30).

(2) Clause 10(3) of the SPA made it clear that even if the purchaser had procured a letter of undertaking from the financier to pay the progressive payments, the onus remained on the purchaser to ensure that the financier made the payments within the stipulated time and the plaintiff could terminate the SPA if the financier failed to make the payments timeously (see para 29).

(3) Apart from entitling the plaintiff to annul and terminate the SPA on the buyer's default in paying the purchase price, cl 10(1) of the SPA entitled the plaintiff to a re-vesting of the property in its name as the registered and beneficial owner thereof. Clause 10 also allowed the plaintiff to forfeit 10% of the purchase price (namely, RM33,880) and to obtain late payment interest charges calculated at 10%pa on the outstanding amount. The plaintiff had calculated the late payment interest amount to be RM23,854.14. Therefore, the total amount the plaintiff was entitled to was RM57,734.14. The plaintiff was entitled to keep the full amount

of RM50,900 paid by the deceased towards account of the RM57,734.14 that it was contractually entitled to (see paras 32 & 34–35).

(4) From the totality of the evidence, the court found that MBB was not in breach of a duty of care to make prompt disbursement of the loan. There was no deliberate delay on MBB's part in disbursing the loan. In addition, MBB's onus to pay the plaintiff as per its letter of undertaking only arose when the conditions for payment stipulated in the letter had been fulfilled. The payment of the MRTA premium was linked to the initial disbursement of the loan. Only when the first drawdown of the loan was made was MBB required to pay the MRTA premium and since the initial loan disbursement was not made, MBB had not breached the contractual obligation to pay the premium, neither did it breach its duty of care in that respect (see para 43).

(5) It was evident from the various clauses in MBB's letter of offer that the death of the borrower was an event of default that entitled it to withdraw/cancel the loan facility. The borrower's death was a material adverse change in circumstances and in such an event it was open to MBB to either continue with the agreement or cancel it. It was within MBB's contractual right to terminate the loan agreement upon the deceased's death. There was no basis in law or in fact to sustain the defendant's action against MBB (see para 44).

[Bahasa Malaysia summary

Plaintif, pemaju perumahan, telah memasuki perjanjian jual beli ('PJB') untuk menjual sebuah rumah ('hartanah tersebut') yang sedang dalam pembinaan kepada pembeli ('si mati') untuk RM338,000. Si mati telah membayar plaintif deposit RM50,900 dan mengambil pinjaman daripada pihak ketiga ('MBB') untuk menyelesaikan baki harga belian. Pinjaman itu terdiri daripada premium yang kena dibayar untuk perlindungan jaminan pengurangan tempoh gadai janji ('JPTG') yang perlu dibayar oleh MBB apabila ia mengeluarkan pinjaman itu. MBB memberi akujanji bersyarat bahawa ia akan melepaskan baki harga belian kepada plaintif jika semua syarat pra-pengeluaran untuk pinjaman dipenuhi. Hartanah itu telah didaftarkan atas nama si mati dan gadaian atas hartanah tersebut telah didaftarkan atas nama MBB. Manakala dua syarat pra-pengeluaran lain masih belum selesai, si mati telah meninggal dunia dalam kemalangan jalan raya. MBB memberitahu plaintif bahawa ia tidak akan mengeluarkan pinjaman dan ia telah menamatkan perjanjian pinjaman itu dan melepaskan gadaiannya atas hartanah tersebut. Plaintif, sementara itu, telah menyiapkan pembinaan hartanah tersebut dan memberitahu defendan, sebagai pentadbir harta pesaka si mati, untuk menyerahkan milikan kosong dan membayar baki harga belian. Defendan tidak mematuhi, dan memaksa plaintif untuk menamatkan PJB tersebut selepas memberi defendan notis 14 hari. Plaintif kemudian telah memfailkan tindakan ini untuk mengisytiharkan bahawa PJB tersebut dan

pemindah milikan hartanah tersebut kepada si mati adalah tidak sah dan memohon perintah agar defendan memindahkan hartanah itu kembali kepadanya. Plaintif juga memohon ganti rugi pada kadar 10% setiap tahun ke atas baki harga belian itu dari tarikh bayaran ansuran perlu dibayar. Defendan berhujah bahawa harta pesaka si mati tidak bertanggungjawab kerana MBB telah memberikan akujanji bahawa ia akan melepaskan pinjaman kepada plaintif. Defendan telah mengatakan bahawa penamatan PJB tersebut dan pembatalan perjanjian pinjaman dan pelepasan gadaian adalah semua tindakan yang tidak sah dan menuntut balas untuk satu deklarasi bahawa PJB tersebut dan pemindahan hartanah tersebut atas nama si mati adalah sah dan kekal wujud. Dengan kebenaran mahkamah, defendan menambah MBB sebagai pihak ketiga kepada tindakan tersebut dan menuntut indemniti dan sumbangan terhadapnya dalam kejadian di mana defendan didapati bertanggungjawab kepada plaintif. Defendan juga memohon deklarasi bahawa pembatalan perjanjian pinjaman MBB dan pelepasan gadaian itu adalah tidak sah. Defendan berhujah bahawa MBB telah melakukan pelanggaran kontrak dan telah cuai kerana enggan untuk melepaskan pinjaman dan membayar premium untuk JPTG. MBB menafikan gadaian tersebut dengan berhujah bahawa pinjaman tidak dilepaskan kerana semua prasyarat untuk pendahuluannya tidak dipenuhi dan bahawa, dalam apa keadaan ia berhak di bawah surat tawaran/perjanjian pinjaman untuk mengeluarkan/membatalkan pinjaman jika pemberi pinjaman meninggal dunia.

Diputuskan, memberikan penghakiman kepada plaintif dan menolak tuntutan pihak ketiga defendan:

(1) Ia jelas berdasarkan klausa 5(4) PJB bahawa obligasi untuk membayar harga belian sentiasa terletak pada pembeli. MBB juga telah menjelaskan bahawa dalam surat akujanjinya kepada plaintif bahawa akujanji itu bersyarat dan tiada apa-apa di dalamnya menjejaskan obligasi pembeli di bawah PJB tersebut. Defendan dengan itu jelas telah melanggar PJB tersebut kerana tidak membayar baki harga belian yang memberi hak kepada plaintif untuk membatalkan PJB tersebut di bawah klausa 10(1)(a)(i). Penamatan PJB plaintif oleh itu adalah sah, dan sah dari segi undang-undang (lihat perenggan 25–28 & 30).

(2) Klausa 10(3) PJB tersebut adalah jelas bahawa meskipun pembeli telah mengeluarkan surat akujanji daripada pembiaya kewangan untuk membayar bayaran ansuran, beban masih terletak pada pembeli untuk memastikan pembiaya kewangan membuat bayaran dalam masa yang ditetapkan dan plaintif boleh menamatkan PJB tersebut jika pembiaya kewangan gagal untuk membuat bayaran-bayaran tersebut mengikut masa (lihat perenggan 29).

(3) Selain daripada memberi hak kepada plaintif untuk membatal dan menamatkan PJB tersebut kerana kegagalan pembeli untuk membayar

harga belian itu, klausa 10(1) PJB tersebut memberi hak kepada plaintif untuk meletakkan semula hartanah tersebut atas namanya sebagai pemilik berdaftar dan benefisial. Klausa 10 juga membenarkan plaintif melupuskan 10% daripada harga belian (iaitu, RM33,880) dan untuk memperoleh caj faedah bayaran lewat dikira pada 10% setiap tahun ke atas baki jumlah. Plaintif telah mengira jumlah faedah bayaran lewat iaitu RM23,854.14. Oleh demikian, jumlah keseluruhan yang plaintif berhak adalah RM57,734.14. Plaintif berhak untuk menyimpan jumlah penuh RM50,900 yang dibayar oleh si mati ke atas jumlah RM57,734.14 yang ia berhak secara kontraktual (lihat perenggan 32 & 34–35).

(4) Berdasarkan keseluruhan keterangan, mahkamah mendapati bahawa MBB tidak melanggar kewajipan berjaga-jaga untuk membuat pendahuluan segera untuk pinjaman itu. Tiada kelewatan yang disengajakan di pihak MBB untuk mendahulukan pinjaman itu. Tambahan, beban MBB untuk membayar plaintif sepertimana dalam surat akujanjinya hanya timbul apabila syarat-syarat untuk bayaran ditetapkan dalam surat itu telah dipenuhi. Bayaran premium JPTG adalah berkait dengan pendahuluan awak pinjaman itu. Hanya apabila pengeluaran pertama pinjaman itu dibuat MBB dikehendaki untuk membayar premium JPTG dan oleh kerana pendahuluan pinjaman wala tidak dibuat, MBB tidak melanggar obligasi kontraktual untuk membayar premium, dan juga tidak melanggar kewajipan berjaga-jaga yang berkaitan (lihat perenggan 43).

(5) Ia jelas daripada pelbagai klausa dalam surat tawaran MBB bahawa kematian pemberi pinjaman adalah kejadian kegagalan yang memberi hak kepadanya untuk mengeluar/membatalkan kemudahan pinjaman. Kematian pemberi pinjaman adalah perubahan bertentangan yang material dalam keadaan dan dalam kejadian sedemikian ia terbuka kepada MBB untuk sama ada meneruskan dengan perjanjian itu atau membatalkannya. Ia adalah dalam hak kontraktual MBB untuk menamatkan perjanjian pinjaman selepas kematian si mati. Tiada asas dari segi undang-undang atau fakta untuk mengekalkan tindakan defendan terhadap MBB (lihat perenggan 44).]

Notes

For cases on sale and purchase agreement, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 6819–6826.

Cases referred to

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12; [1996] 2 CLJ 561, FC (refd)

Khatdah bin Ahmad v CIMB Bank Bhd (formerly known as Bumiputra-Commerce Bank Bhd) [2011] MLJU 1194, HC (refd)

A *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89, PC (refd)
Master Strike Sdn Bhd v Sterling Heights Sdn Bhd [2005] 3 MLJ 585, CA (refd)
Penang Development Corporation v Khaw Chin Boo & Anor [1993] 2 MLJ 161; [1993] 3 CLJ 167, HC (refd)
RHB Bank Bhd v Travelsight (M) Sdn Bhd & Ors and another appeal [2016] 1
B MLJ 175, FC (refd)
Siti Juriah bt Sahari and Others v Citibank Sdn Bhd and Anor [2009] MLJU 560; [2010] 1 CLJ 252, HC (refd)
Soon Yee Ling & Anor v Lim Ah Hun [2011] 1 MLJ 735, FC (refd)
Sun Properties Sdn Bhd & Ors v Happy Shopping Plaza Sdn Bhd [1987] 2 MLJ
C 711, SC (refd)
Tan Ong Ban v Teoh Kim Heng [2016] 3 MLJ 23; [2016] 3 CLJ 193, FC (refd)

Legislation referred to

Contracts Act 1950 s 47
D Housing Development (Control and Licensing) Regulations 1989 Schedule G
Small Estates (Distribution) Act 1955

Terrence Chan (KP Ng & Amardas) for the plaintiff.
Melvin Tay (Damian Yeo and Benjamin Tay with him) (Damian SL Yeoh & LC
E *Goh) for the defendant.*
Wong Fook Meng (Tan Siok Khoon with him) (Chee Siah Lee Kee & Partners) for the third party.

Vazeer Alam J:

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THE ANTECEDENT FACTS AND THE PLAINTIFFS' CLAIM

[1] The late Chan Yau Seng ('the deceased') entered into a sale and purchase agreement dated 25 May 2012 with the plaintiff for the purchase of a house
G being built by the plaintiff, as developer, on a plot of land known as PT 7346, Mukim Kelemek, Daerah Alor Gajah, State of Melaka, held under HS(D) 19834 ('the property') at a price of RM338,800.

[2] The deceased obtained a loan from Malayan Banking Bhd, the third
H party, to part finance the purchase of the property. The total loan amount of RM297,037 comprised two components, ie the sum of RM9,137 as the premium for the mortgage reducing term assurance ('MRTA') to cover the loan, and the balance RM287,900 was to pay the balance purchase price. Messrs Anuar Hong & Ong, were the firm of solicitors who acted for the
I deceased in both the sale and purchase agreement and the loan documentation.

[3] The loan documentation was executed and dated 6 August 2012. The plaintiff confirmed to Messrs Anuar Hong & Ong that the deceased had paid the difference between the loan sum and purchase price amounting to

RM50,900. Therefore, the third party would pay all subsequent progressive payments of the purchase price to the plaintiff, upon all pre-disbursement conditions having been fulfilled.

[4] The third party via letter dated 23 August 2012 gave the plaintiff a conditional undertaking to pay the progressive payments provided that all pre-disbursement conditions of the loan are fulfilled. One of the pre-disbursement conditions would be the registration of the charge on the property in favour of the third party. To facilitate the entry of the charge in favour of a financier of a property under construction where the full purchase price has not been paid, it is customary practice for the registered ownership of the property that is under construction, ie the subject property of the sale, to be transferred in the name of the purchaser and then for the charge in favour of the financier being entered, usually simultaneously one after the other. This is normally done on the basis of cross obligations or undertakings given by the parties concerned to each other.

[5] The present case is no different. The plaintiff had forwarded the original issue document of title to the property as well as the duly executed memorandum of transfer in favour of the deceased upon the third party's usual undertaking to pay the loan sum to the plaintiff in accordance to the SPA. The transfer of ownership of the property to the deceased and charge in favour of the third party was registered on 29 August 2012. Then, Messrs Anuar Hong & Ong vide letter dated 3 September 2012 wrote to the third party advising drawdown and disbursement of the loan, progressively. The first drawdown would also include the payment of the MRTA premium to the insurance company. It is an uncontroverted fact that by that date a sum of RM169,320 in progressive claim was outstanding to be paid by the deceased to the plaintiff. The plaintiff made a claim for payment this sum of RM169,320 vide letter dated 20 September 2012 supported by the architect's certificate.

[6] Before the third party made any disbursement of the loan, or any part thereof, the deceased passed away on 27 September 2012 in a tragic road accident. The third party did not make any disbursement of the loan and there seems to have been some discussion between the plaintiff, defendant and third party on this matter. The third party through its solicitor's letter of 22 May 2013 informed the plaintiff that the third party would not be making any disbursement of the loan. Nevertheless, the plaintiff kept sending notice of periodic progress claims to the third party, however, none were honoured with payment.

[7] The plaintiff had completed construction of the property and on 5 August 2013 gave notice of delivery of vacant possession and demanded payment of the balance purchase price. The deceased's personal representative,

ie the defendant, did not take vacant possession of the property, nor was the outstanding balance purchase paid. The plaintiff then vide letter dated 30 October 2013 addressed to the defendant demanded payment of the outstanding sum of RM287,900 within 14 days failing which the plaintiff shall terminate the sale and purchase agreement. The defendant did not make payment of the outstanding purchase price within the 14 days.

[8] The defendant was appointed the administrator of the estate of the deceased on 14 November 2013 under the Small Estates (Distribution) Act 1955. The plaintiff then by letter dated 19 November 2013 gave notice to the defendant that, as corollary to its earlier letter of 30 October 2013, the sale and purchase agreement was terminated for non-payment of the balance purchase price.

[9] Following the termination of the loan agreement, the third party on 11 December 2013 discharged the charge entered on the property in its favour. However, the property remained registered in the name of the deceased as the registered owner.

[10] Wherefore, the plaintiff claims for the following relief:

(a) a declaration that the sale and purchase agreement dated 25 May 2012 entered between the plaintiff and the deceased is void;

(b) a declaration that the transfer of ownership of the land known as PT 7346, Mukim Kelemek, Daerah Alor Gajah, State of Melaka, held under HS(D) 19834 in the name of deceased on 29 August 2012 vide Presentation No 11965/2012 is void;

(c) an order compelling the defendant to execute all forms and documents to retransfer ownership of the land known as PT 7346, Mukim Kelemek, Daerah Alor Gajah, State of Melaka, held under HS(D) 19834, to the plaintiff, failing which the senior assistant registrar be authorised to execute all such documents; and

(d) damages at the rate of 10%pa on the outstanding sum of RM287,900 calculated from the date when the progressive payments were due.

THE DEFENDANT'S DEFENCE AND COUNTERCLAIM

[11] The defendant in her defence states that the deceased had to date paid the sum of RM50,900 as deposit and part payment of the purchase price to the plaintiff. The defendant avers that the balance of the purchase price amounting to RM287,900 is to be paid by the third party from the loan granted to the deceased, and in this regard the defendant further avers that the third party had given an undertaking to do so. As such the defendant states that the plaintiff

ought to have named the third party as a defendant in the main action, as the third party had refused to disburse the loan.

[12] The defendant further contends that the termination of the sale and purchase agreement by the plaintiff and the cancellation of the loan and/or the non-disbursement of the loan by the third party are improper and invalid in law.

[13] By reason of the foregoing, the defendant avers that the estate of the deceased has suffered loss and damage and claims for the same. Over and above the payment of the partial purchase price of RM50,900, the defendant states that the estate of the deceased had also incurred other related expenses, which includes the sum of RM12,000 as solicitors fees and disbursements for the sale and purchase agreement and loan documentation, the sum of RM3,388 for stamp duty, the sum of RM210 as processing fee for the loan, and the sum of RM59 as quit rent.

[14] Wherefore, the defendant claims the following relief:

(a) a declaration that the sale and purchase agreement dated 25 May 2012 is valid and subsisting;

(b) a declaration that the registration of transfer of ownership of the property known as PT 7346, Mukim Kelemek, Daerah Alor Gajah, State of Melaka, held under HS(D) 19834, in the name of deceased is valid and lawful; and

(c) in the alternative to the above, special and general damages.

[15] The plaintiff denies the defendant's counterclaim and states that the defendant does not have any discernable cause of action against the plaintiff.

THE THIRD PARTY CLAIM

[16] The defendant after having obtained leave of court filed a third party claim against the third party principally on grounds that if the defendant is held liable to the plaintiff in the main action, then the defendant is entitled to claim against the third party for indemnity and contribution.

[17] The defendant alleges that the third party having taken a charge on the property and further having given an undertaking to pay the loan sum to the plaintiff in accordance to the facility agreement had breached the contract by failing to disburse the loan to the plaintiff promptly and/or by unilaterally terminating the loan agreement by discharging the charge.

[18] The defendant further alleges that the third party was negligent in failing to make prompt payment of the MRTA premium, thus depriving the estate from the MRTA benefit following the deceased's death. The particulars of negligence are provided in para 17 of the statement of claim against third party.

[19] Wherefore the defendant claims against the third party the following relief:

(a) order for indemnity or contribution towards liability in respect of the plaintiff's claim;

(b) the issues raised in the plaintiff's main claim be determined not only between the plaintiff and the defendant but holistically as between the plaintiff and/or defendant and/or third party;

(c) a declaration that the withdrawal or cancellation of the letter of offer dated 21 May 2012, the facility agreement dated 6 August 2012, the letter of undertaking dated 23 August 2012 and/or the discharge of charge dated 11 December 2013 by the third party is invalid in law;

(d) an order of specific performance or alternatively damages for the third party's breach and/or failure to procure the MRTA within time; and

(e) damages — general, special and aggravated.

[20] The third party denies the defendant's third party claim and avers that the disbursement of the loan is subject to the third party's satisfaction that all conditions precedent have been fulfilled. Further the third party states that under the terms of the facility agreement it is entitled to withdraw the loan facility at any time without giving reasons. Additionally, the third party states that the facility may be withdrawn in the event of the death of the borrower, ie the deceased in this case.

[21] The third party further states that the loan was not disbursed prior to the death of the deceased as all pre-disbursement conditions were not met, and in particular several documents that were required by the third party were not forwarded.

[22] The third party states that when it came to know of the deceased's death on 27 September 2012, the third party was entitled to withdraw the loan and/or terminate the facility agreement. The third party avers that in discussions with the defendant after the deceased's passing, it was suggested that the defendant get someone else to replace the deceased as the borrower. However, the defendant refused to substitute the deceased and insisted on the loan being disbursed in the name of the deceased.

[23] Therefore, the third party denies any breach of contract or negligence in the non-disbursement of the loan, prior to and/or after the death of the deceased.

Issue 1 — Whether the termination of the sale and purchase agreement by the plaintiff on 19 November 2013 is lawful?

[24] It is an uncontroverted fact that the plaintiff had completed building the house and notice of delivery of vacant possession had been given. It is also an undisputed fact that when the plaintiff terminated the sale and purchase agreement on 19 November 2013, the deceased had only paid the sum of RM50,900 towards the purchase price with a balance of RM287,900 remaining unpaid. The defendant contends that pursuant to the facility agreement, and the letter of undertaking given by the third party, the onus is on the third party to make payment of the loan sum, which is equivalent to the outstanding balance purchase price. However, the third party asserts that its obligation to disburse the loan sum is conditional upon fulfillment of the conditions precedent, and that the conditions precedent were not fulfilled to their satisfaction. As such the third party asserts that the defendant's complaint of breach of contract and/or negligence on the part of the third party is misplaced. I will now consider these arguments.

[25] Clause 5(4) of the SPA provides that:

> Subject to subclause (3), if the Purchaser fails to accept the Loan or default in complying with the necessary requirement for the application or is disqualified as a result of which the Loan is withdrawn by the Financier, as the case may be, the Purchaser shall then be liable to pay the Vendor the whole of the purchase price or such part thereof as shall then remain outstanding.

It is clear from cl 5(4) that the obligation to pay the purchase price is always on the deceased, as purchaser. In fact, the third party makes it very clear in the letter of undertaking issued to the plaintiff that the undertaking is conditional and state unequivocally 'Nothing herein contained shall affect the obligations on the part of the said purchasers to be performed under the said sale and purchase agreement'. And following the deceased's death, that obligation to pay is borne by the estate of the deceased. The fact of the matter is that the third party has cancelled the loan facility. As such, according to cl 5(4) of the SPA, the onus is on the estate of the deceased to make payment of the balance purchase price. The evidence shows that this fact was communicated to the defendant by the plaintiff, and the defendant ('DW1') admitted during cross-examination that she was so informed by the plaintiff (see p 26 of the notes of proceedings).

[26] Even though the deceased, and subsequently the estate of the deceased,

failed to make payment of the balance purchase price progressively during the period when the house was under construction, the plaintiff did not rush to terminate the agreement. The evidence shows that the plaintiff gave the defendant time to make payment and proceeded with the construction work till completion and was prepared to deliver vacant possession. In fact, when the final demand for payment was made by the plaintiff well after notice of vacant possession had been given, the demand was only for the outstanding principal amount of the balance purchase price of RM287,900 without any claim for contractual late payment interest. However, the defendant did not make any arrangement to make payment of the balance purchase price. Thus, it is clear that the defendant was in breach of contract in not making payment of the balance purchase price.

[27] The rights of parties arising from a default of payment of purchase price by the purchaser is spelt out in cl 10(1)(a)(i) of the SPA, which states that:

> If the Purchaser:
>
> subject to subclause (3) below, fails to pay any instalment payable under subclause 4(1) in accordance with the Third Schedule hereto or any part thereof and any interest payable under clause 9 for any period in access of twenty-eight (28) days after its due date;
>
> ...
>
> the Vendor may, subject to subclause (2) hereof, annul the sale of the said Property and forthwith terminate this Agreement ...

However, before the plaintiff can avail itself of the right to terminate the SPA on account of non-payment of the purchase price, it must give the requisite notice as required under cl 10(2), which reads:

> Upon the occurrence of any of the events set out in paragraph 10(1)(a), (b), (c) or (d) herein, the Vendor shall give the Purchaser or his solicitors not less than fourteen (14) days notice in writing by A.R. Registered Post to treat this Agreement as having been repudiated by the Purchaser and unless in the meantime such default and/or breach alleged is rectified or such unpaid instalments and interest are paid or subclause (3) hereof shall apply, this Agreement shall, at the expiration of the said notice at the option of the Vendor be deemed to be terminated.

The defendant admits having received the letter dated 30 October 2013 (p 13 of Bundle B) issued pursuant to cl 10(2) of the SPA giving the defendant 14 days to make payment of the balance outstanding of RM287,900. There is no issue as regards service of the contractual notice. The defendant however did not rectify the breach by tendering payment of the balance purchase price, as demanded.

[28] Now, the defendant argues that as the deceased had obtained a loan to finance the payment of the balance purchase price, and had further procured the Letter of Undertaking from the third party to pay the loan sum to the plaintiff, and since the solicitor's had confirmed that loan documentation had been perfected for disbursement, therefore the deceased, and by extension the defendant, had fulfilled their obligations under the contract. I am afraid that I am unable to accept that argument for the following reason. Clause 10(3) of the SPA provides that:

> If the Purchaser shall have before expiry of the said fourteen (14) days notice obtained approval of the Loan and paid the difference between the purchase price and the Loan and delivered to the Vendor the undertaking letter from the Financier to release the Loan to the Vendor, the Vendor then shall not annul the sale of the property and terminate this Agreement unless the Financier shall default in its undertaking to release the Loan to the Vendor or fail to make the first disbursement of the Loan to the Vendor within thirty (30) days from the expiry of the said fourteen (14) days notice.

[29] Now this cl 10(3) makes it very clear that even if the purchaser has procured the letter of undertaking from the financier to make payment of the progressive claim, the onus remains on the purchaser to ensure that the financier makes such payment within the stipulated time. As according to this clause even in situations where the financier has given a letter of undertaking to pay, the vendor may terminate the agreement in the event of the failure of the financier to make such payments timeously.

[30] The law is well settled that the payment of purchase price in a contract for sale of real property is a fundamental contractual term. The failure or default on the part of the purchaser to make payment of the purchase price is a fundamental breach, which is ground for termination of the contract. In *Master Strike Sdn Bhd v Sterling Heights Sdn Bhd* [2005] 3 MLJ 585, the Court of Appeal decided as follows:

> The obligation to pay the purchase price is a fundamental obligation. The Court of Appeal in *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675 at p 682 ruled:
>
> > In the absence of any special considerations in a contract for the sale of land, the obligation to pay the purchase price is fundamental.
>
> Thus, any breach for non payment of the purchase price shall go to the root of the agreement thereby rendering the agreement terminated and the deposit forfeited (*Siah Kwee Mow & Anor v Kulim Rubber Plantations Ltd* [1979] 2 MLJ 190). In the instant case, where time was stipulated as of the essence, the respondent was entitled to forfeit the deposit on account of the appellant's breach to pay the balance of purchase price on time (see *Sun Properties Sdn Bhd & Ors v Happy Shopping Plaza Sdn Bhd* [1987] 2 MLJ 711).

[31] In the present case, the SPA is in the standard form Schedule G of the Housing Development (Control and Licensing) Regulations 1989, and cl 8 stipulates that time shall be the essence of the contract in relation to all provisions of the agreement. Thus, the non-payment of balance purchase price of RM287,900 in accordance to the stipulated time is a fundamental breach of the SPA, and amounts to a repudiation of the contract on the part of defendant. The plaintiff is entitled to accept the repudiation and terminate the contract in accordance to the stipulations in cl 10(1)(a)(i) of the SPA, which is precisely what the plaintiff did vide letter dated 19 November 2013. Therefore, in the circumstance, I find that the plaintiff's termination of the SPA is valid and lawful.

Issue 2 — What is the effect of the termination of the SPA?

[32] Clause 10(1) of the SPA provides that if the defendant defaults in payment of the purchase price or any part thereof, the plaintiff is entitled to annul the sale and terminate the agreement. The same cl 10(1) further stipulates that in the event of termination of the SPA by the plaintiff, the following consequences would ensue:

> The Vendor may, subject to subclause (2) hereof, annul the sale of the said Property and forthwith terminate this Agreement and in such an event:
>
> (i) the Vendor shall be entitled to deal with or dispose of the said Property in such manner as the Vendor shall see fit as it this Agreement had not been entered into;
>
> (ii) the instalments previously paid by the Purchaser to the Vendor, excluding any interest paid, shall be dealt with and disposed of as follows:
>
> (a) firstly, all interest calculated in accordance with clause 9 hereof owing and unpaid shall be paid to the Vendor;
>
> (b) secondly, a sum equal to ten per centum (10%) of the purchase price thereof shall be forfeited to the Vendor; and
>
> (c) lastly, the residue thereof shall be refunded to the Purchaser;
>
> (iii) neither party hereto shall have any further claim against the other for costs, damages, compensation or otherwise hereunder; and
>
> (iv) each party hereto shall pay its own costs in the matter.

[33] The contractual stipulation is, therefore, very clear; in that, upon the annulment/termination of the sale, the plaintiff is entitled to deal with the property in such manner as the plaintiff deems fit, as if the SPA had not been entered into. Thus, the status of the property must revert to its pre-contractual state. Now, in the present case, the ownership of the property has been transferred and registered in the name of the deceased even before the full payment of the purchase price. This was done to facilitate the entry of the

charge in favour of the third party and the release of the loan. However, the third party never released the loan and had subsequently terminated the facility agreement and discharged the charge. Although, registered ownership had been transferred to the deceased, the beneficial ownership remained with the plaintiff until full purchase price is paid, see *Tan Ong Ban v Teoh Kim Heng* [2016] 3 MLJ 23; [2016] 3 CLJ 193 (FC); *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12; [1996] 2 CLJ 561 (FC). It is only upon the payment of the full purchase price that the beneficial ownership of the property vests with the defendant.

[34] It is well settled that upon rescission of a contract involving the sale of land, the property will revest onto the original owner as if the contract was never entered into. This principle was reiterated by the Federal Court in *RHB Bank Bhd v Travelsight (M) Sdn Bhd & Ors and another appeal* [2016] 1 MLJ 175 in the following terms:

> When a contract is rescinded it has the effect of revesting any property transferred in the transferor, so far as no formal steps are required for the retransfer. Thus property in goods will revest in the victim of fraud without more. If land has been conveyed, rescission will have the effect that the representor holds the title on constructive trust for the representee (*Chitty on Contracts* (13th Ed, Vol 1) para 6-114; see also *Greater Pacific Investments Ltd (in liquidation) v Australian National Industries Ltd* (1996) 39 NSWLR 143 at p 153). ... Upon a valid rescission of a contract at common law the legal title to the property which had passed to the wrongdoer automatically revests in the complainant. This is the case in relation to rescission on the ground of fraudulent misrepresentation [for rescission on the ground of innocent misrepresentation, see *Admiral Cove Development Sdn Bhd v Balakrishnan a/l Devaraj & Anor* [2011] 5 MLJ 309, and *Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim* [2003] 3 MLJ 460. ... when granting rescission in equity, the court has powers to make appropriate orders for revesting of legal title ... the court recognises that, upon rescission of the contract, the beneficial title, which had passed to the transferee, revests in the transferor. The revesting is retrospective, since it seeks to put the complainant (transferor) in the position in which he would have been if the parties had not entered into the contract. This retrospective revesting gives the transferor a sufficient proprietary title to trace and recover the property.

Thus, following the termination of the SPA, the plaintiff would be entitled to a revesting of the property in its name as the registered and beneficial owner, as if the SPA was never entered into in the first place.

[35] The deceased had paid the plaintiff the sum of RM50,900 as deposit and part payment of the purchase price. Following the termination, according to cl 10 of the SPA, the plaintiff is contractually entitled to keep the sum of RM33,880 being the 10% forfeitable deposit; and shall be further entitled to late payment interest charges calculated at 10%pa on the outstanding amount,

see *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 (PC); *Sun Properties Sdn Bhd & Ors v Happy Shopping Plaza Sdn Bhd* [1987] 2 MLJ 711; *Soon Yee Ling & Anor v Lim Ah Hun* [2011] 1 MLJ 735 (FC). The plaintiff has calculated late payment interest in accordance to the stipulation in cl 10 to be RM23,854.14. Therefore, the total amount that the plaintiff is entitled to is RM57,734.14 (RM33,880 + RM23,854.14). Thus, I find that the plaintiff is entitled to keep the full amount of RM50,900 paid by the deceased, towards account of the amount of RM57,734.14 that the plaintiff is contractually entitled to.

Issue 3 — Is the third party under a duty to disburse the loan promptly and if so did it fail to do discharge that duty?

[36] The defendant contends that the deceased had executed the facility agreement and attended to all matters that was required of him for the loan to be disbursed, and that in fact the solicitors handling the loan documentation had vide letter dated 3 September 2012 confirmed to the third party that the loan documentation was complete and that the charge in favour of the third party had been registered and therefore 'subject to the fulfillment of all conditions precedent' the solicitors were of the opinion that it was in order for the third party to disburse the loan progressively to the plaintiff. Thus, the defendant states that a speedy and prompt disbursement of the loan, including the payment of the MRTA premium of RM9,137 would have meant that the full purchase price would have been settled partially by the progressive loan disbursement up till the deceased's death and partially by the proceeds of the MRTA upon the death of the deceased on 27 September 2012.

[37] This solicitor's letter of instruction dated 3 September 2012 was received by the third party on 5 September 2012. The third party's officer attending to the loan disbursement, namely Puan Norallieza bt Samsuddin ('TPW2'), wrote an email to the solicitors on 5 September 2012 informing that the documentation was incomplete and requested the solicitors to forward: (a) the statutory declaration affirmed by the deceased confirming that the property was for owner occupatio; and (b) the original of the official land search. TPW2 informed the solicitors that these documents were necessary before the loan could be disbursed. A copy of the email was tendered in court marked as 'exh TP2'.

[38] The defendant states, that even though the documents requested by TPW2 had been forwarded together with the solicitor's letter of instruction dated 3 September 2012, the solicitors once again forwarded these two documents to the third party vide cover of letter dated 7 September 2012 (p 140 of Bundle E). That letter together with the accompanying documents was delivered to the third party's office in Johor Bahru on 14 September 2012.

The third party's acknowledgement stamp dated 14 September 2012 is affixed on that letter. Therefore, the defendant submits that all conditions for the disbursement of the loan had been fulfilled and therefore, in accordance to the facility agreement and the letter of undertaking, the third party ought to have promptly disbursed the loan progressively and also pay the MRTA premium.

[39] In support of this contention, learned counsel for the defendant refers to s 47 of the Contracts Act 1950 for the proposition that when a contract does not provide time for performance then it must be performed within reasonable time. See also *Penang Development Corporation v Khaw Chin Boo & Anor* [1993] 2 MLJ 161; [1993] 3 CLJ 167 — where the court held that time cannot be arbitrarily fixed by a party and that it must reasonable having regard to the state of things at the material time.

[40] Learned counsel for the defendant has further found support for his contention in the High Court case of *Khatdah bin Ahmad v CIMB Bank Bhd (formerly known as Bumiputra-Commerce Bank Bhd)* [2011] MLJU 1194, where Vernon Ong J (as he then was) in construing the issue of whether the defendant bank was negligent in not disbursing a loan timeously, held:

> In this case, the relationship between the parties was that of bank and customer. Since the plaintiffs loan application had been approved, the defendant owed a duty of care to the plaintiff to process and disburse the loan within a reasonable time; as shall accord with normal banking custom, practice and procedures.

[41] Therefore, if all conditions for disbursement had been fulfilled, the third party must disburse the loan within a reasonable time, having regard to industry practice or even the practice of the third party. In this regard, learned counsel for the defendant submits that both the third party's witnesses, Nor Allieza bt Samsuddin ('TPW2'), and Azman bin A Wahid ('TPW1'), had testified that the 'Standard Operating Procedure' of the third party was for any loan to be disbursed within 1 day after the loan documents were in order and the pre-disbursement conditions have all been fulfilled to the satisfaction of the bank. Therefore, learned counsel for the defendant submits that the loan ought to have been disbursed with its first drawdown on the next business day after 14 September 2012 (Friday), which falls on 17 September 2012 (Monday). The failure to do so, submits counsel, is a breach of the duty of care imposed on the third party, and therefore counsel contends that this is negligence on the part of the third party.

[42] Learned counsel for the third party counters that argument as follows. Whilst, the documents sought by TPW2 were delivered at the third party's Credit Administration Centre in Johor Bahru on 14 September 2012, TPW2 did not receive them on that day. The reason for the delay in TPW2 receiving these two documents is that the covering letter of 7 September 2012 not only

attached the two documents requested by TPW2, but also the original title deed to the property and the duplicate charge dated 29 September 2012. These two latter documents, namely, the title deed and duplicate charge, which are security documents are kept by the credit support unit of the third party. Thus, according to TPW2, the solicitor's letter of 7 September 2012 and all the documents attached thereto were sent initially to the credit support unit and whilst the documents were being processed and before the requested documents arrived at TPW2's desk, the deceased had unfortunately passed away. Therefore, learned counsel for the third party, whilst conceding that the standard operating procedure for disbursement of loan is one day, submits that the one day would be from the time when the officer handling the approval for disbursement, in this case TPW2, has received all the necessary documents and is satisfied that all pre-disbursement conditions have been complied or fulfilled. And since TPW2 did not receive the documents up until the death of the deceased on 27 September 2012, counsel submits that, the third party was under no obligation to make disbursement of the loan.

[43] Having considered the submissions of parties, I am inclined to agree with learned counsel for the third party. I find that there is no deliberate delay on the part of the third party in disbursing the loan. TPW2, who was the officer handling the disbursement, had promptly replied the solicitor's letter of 3 September 2012 (which was received on 4 September 2012) on the very next day, ie 5 September 2012, via email requesting for the missing documents. The solicitors forwarded the requested documents together with several other documents, which were not required by TPW2, but were meant for safekeeping by another department. This mixture of documents were sent to the third party on 14 September 2012 and had been routed to the credit support unit by virtue of the original title deed and duplicate charge that were enclosed. These are important security documents and I can readily understand the reason why all these documents, including the ones required by TPW2, were sent to the credit support unit first. Therefore, the loan disbursement could not be approved by TPW2, as she did not receive the documents even up till the death of the deceased. During the period from 14 September 2012 till the deceased's death on 27 September 2012 (ie nine working days) the documents were obviously flowing through and/or floating within the third party's office in Johor Bahru. The third party cannot be faulted for not having the documents on the desk of TPW2 much earlier. The solicitor, En Mohd Nazri bin Abd Hamid ('DW2'), a partner in the firm of Messrs Anuar Hong & Ong in his testimony did not make mention of him or his office following up with TPW2, or anyone else at the third party's office, as regard the loan disbursement after the dispatch of the documents under cover his letter of 7 September 2012. The receipt of the documents after the death of deceased would be of no use in the scheme of things, as the event of the deceased's death completely altered the legal landscape in so far as the loan agreement was concerned, and I will attend to that shortly. Therefore, from the totality of the

evidence, I do not find that the third party was in breach of its duty of care to make prompt disbursement of the loan. Additionally, the third party's onus to pay the plaintiff as per the letter of undertaking would only arise when the conditions for payment stipulated in the letter of undertaking have been first fulfilled, for the undertaking is at best a conditional undertaking, see *Siti Juriah bt Sahari and Others v Citibank Sdn Bhd and Anor* [2009] MLJU 560; [2010] 1 CLJ 252. The payment of the MRTA premium is linked to the initial disbursement of the loan. Only when the first drawdown of the loan had been made, would the third party make payment of MRTA premium, and since the initial loan disbursement was not made for reasons discussed earlier, I do not find the third party having breached the contractual obligations to pay the MRTA premium or having breached its duty of care in that respect.

Issue 4 — Is the termination of the loan agreement by the third party valid and lawful?

[44] The following clauses in the letter of offer are relevant.

Clause 8 — Appendix II of the letter of offer provides:

> 8. CANCELLATION/SUSPENSION AND DEMAND
>
> Notwithstanding any other provisions herein stated relating to the availability of the facility(s) or any part thereof, the Bank reserves the right to recall or cancel or suspend the facility(s) or any part thereof, at any time it deems fit without assigning any reason thereto by giving notice of the same whereupon the facility(s) or such part thereof shall be recalled or cancelled and the whole indebtedness or such part thereof shall be repayable upon demand or suspended until such time as the bank deems fit to uplift the suspension or recall or cancel the suspended facility(s).

Clause 13 — Appendix II of the letter of offer reads:

> 13. EVENTS OF DEFAULT
>
> Notwithstanding any of the provisions herein relating to repayment to the facility(s), the facility(s) or any part thereof may be cancelled whereupon all principal and advances for the time being outstanding and unpaid together with interest thereon and all other moneys owing to the Bank secured by any security shall be repayable on demand in the event:-
>
> ...
>
> ii. You, your guarantor or security party dies, become insane or is adjudicated a bankrupt or is wound up;
>
> ...
>
> vii. Any event occurs or circumstances arose including changes in your financial condition which in the opinion of the Bank would materially affect your ability or

your guarantor or security party's ability to perform or comply with your/his obligations to the Bank;

Further the following clauses in the facility agreement are relevant to the determination of this issue.

Section 5.01 CONDITIONS PRECEDENT TO DRAWING

The Borrower may not commence to make any Drawings on the Facility until the fulfillment in manner satisfactory to the Bank, prior to the first (1*st*) Drawdown date, of the following conditions precedents:

...

(e) the Bank is satisfied that as from the date when the Borrower first applied the Facility there has been no material adverse changes in the financial affairs of the Borrower which could or might adversely affect the decision of the Bank to proceed with or continue the Facility.

And Section 5.02 provides:

SECTION 5.02 CONDITIONS PRECEDENT TO DISBURSEMENT

Notwithstanding Section 5.01, the obligation of the bank to make available any Drawing or disbursement thereof is also subject to following conditions:

(a) the Bank is satisfied that no event has occurred so as to render the Facility or any of the Advances to become immediately repayable under the provisions of any of the Security Documents;

...

(d) there is no default by the Borrower and/or the Security Party in the performance of any of the terms and conditions contained in any of the Security Documents;

And Section 11.01 states:

SECTION 11.01 EVENTS OF DEFAULT

The Borrower is deemed to have committed a default if the Borrower commits or threatens to commit a breach of any of the covenants, undertaking, stipulations, terms, conditions, or provisions herein stipulated and without prejudice to the generality of the foregoing, upon the happening of any one or more of the following events:

...

(s) if the Borrower or any Security Party who is a natural person or individual dies or becomes insane or is adjudged a bankrupt; or ...

And finally Section 11.02 provides:

SECTION 11.02 RIGHTS OF BANK ON DEFAULT

If the default pursuant to Section 11.01 or if any of the events stipulated in Section 11.01 hereof shall happen and which is capable of remedy is not remedied ..., the Bank shall be entitled forthwith to take such action as may be appropriate against the Borrower.

Now, from these contractual clauses it is quite evident that the death of the deceased, the borrower, is an event of default. And in the event of a default occurring the third party is at liberty to withdraw and/or cancel the facility. Additionally, the death of the deceased is definitely a material adverse change in circumstances and in such an event it is open to the third party consider whether it wishes to continue with the agreement or to cancel it. The third party in exercising its discretion had chosen to cancel the facility. In the circumstance, I find that it was within the third party's contractual right to terminate the loan agreement upon the death of the deceased. Therefore, I find that there is no basis on law, or in fact, to sustain the defendant's action against the third party.

[45] In the premise of the foregoing, judgment was entered for the plaintiff against the defendant in terms of prayers in para 14(a), (b), (c) and (d) of the amended statement of claim. The defendant's third party claim was dismissed.

[46] Parties to bear their own cost. Orders accordingly.

Orders accordingly.

Reported by Ashok Kumar